(15,800.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 532.

ARTHUR D. ANDREWS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1895.

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I In the District Court of the United States of the Southern District of California.

UNITED STATES OF AMERICA, Plaintiff,
vs.
ARTHUR D. ANDREWS, Defendant.
} At Law. Petition for Writ of Error.

Now comes the said Arthur D. Andrews, defendant herein, and says that on or about the 5th day of March, 1894, this court entered judgment herein in favor of the United States and against this defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudices of this defendant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

J. MARION BROOKS,
Attorney for Defendant.

(Endorsed:) No. 582. In the U. S. district court. United States, plaintiff, *vs.* Arthur D. Andrews, defendant. Petition for writ of error. Filed December 31, 1894. E. H. Owen, clerk. J. Marion Brooks, attorney for defendant.

II The District Court of the United States in and for the Southern District of California.

UNITED STATES, Plaintiff,
vs.
ARTHUR D. ANDREWS, Defendant.
} At Law. No. 582.

This 31st day of December, 1894, came the defendant, by his attorney, and filed here and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof the court does allow the writ of error, and the sentence of the defendant is hereby further suspended until the hearing of this cause in the said Supreme Court.

December 31st, 1894.

ROSS, *Dist. Judge.*

(Endorsed:) No. 582. In the district court of the United States for the southern district of California. United States, plaintiff, *vs.*

Arthur D. Andrews, defendant. Order allowing writ of error. Filed December 31, 1894. E. H. Owen, clerk. J. Marion Brooks, attorney for defendant.

III UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States as plaintiff and Arthur D. Andrews, defendant, a manifest error hath happened, to the great damage of the said Arthur D. Andrews, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the 25th day of January next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 31st day of December, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and nineteenth.

Seal of the U. S. District Court, Southern Dist. of California.

E. H. OWEN,
Clerk of the U. S. District Court in and for the Southern District of California.

The above writ of error is hereby allowed.

E. M. ROSS,
U. S. Dist. Judge.

[Endorsed:] United States Supreme Court. Arthur D. Andrews, plaintiff in error, *vs.* The United States of America, defendant in error. Writ of error. Filed Dec. 31st, 1894. E. H. Owen, clerk.

IV In the District Court of the United States for the Southern District of California, the U. S. of America.

United States District Court for the Southern District of California, *ss:*

Geo. A. Denis, U. S. attorney for the southern district of California, Greeting:

You are hereby cited and admonished to be and appear at the session of the United States Supreme Court to be holden at the city

of Washington, the District of Columbia, on the 25th day of January next, pursuant to the writ of error filed in the clerk's office of the district court of the United States for the southern district of California, wherein Arthur D. Andrews is plaintiff in error and The United States is defendant in error, to show cause, if any therein, for judgment rendered against the said plaintiff in error, as in writ of said error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the thirty-first day of December, in the year of our Lord 1894, and the Independence of the United States of America the 119th year.

E. M. ROSS,
U. S. District Judge.

V I hereby, this the thirty-first day of December, accept due personal service of this citation in behalf of The United States of America, the defendant in error *appeared.*

GEORGE J. DENIS,
U. S. Attorney in and for the Southern District of California.

VI [Endorsed:] Dep't —. No. —. In the district court of the United States, southern district of the State of California. United States, plaintiff, *vs.* Arthur D. Andrews, defendant. Citation. ceived copy of within citation this 31st day of Dec., 1894. George J. Denis, attorney for U. S. Filed December 31st, 1894. E. H. Owen, clerk. —— ——, deputy clerk. J. Marion Brooks, Downey block, cor. New High and Temple streets, opposite court-house, attorney for —.

VII *The Answer of the Judge of the District Court of the United States in and for the Southern District of California.*

The record and all proceedings of the complaint whereof mention is within made and all things touching the same we certify under the seal of our said district court to the United States Supreme Court in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal of the U. S. District Court, Southern Dist. of California.]

E. H. OWEN, *Clerk.*

1 In the District Court of the United States in and for the Southern District of California.

At a stated term of said court begun and holden *on* at the city of Los Angeles, county of Los Angeles, within and for the southern district of California, on the second Monday in August, in the year of our Lord one thousand eight hundred and ninety-three—

The grand jurors of the United States of America within and for the district aforesaid on their oath present—

That A. D. Andrews, late of the southern district of California, heretofore, to wit, on the 2nd day of November, in the year of our Lord one thousand eight hundred and ninety-three, at the city of Los Angeles, county of Los Angeles, within the southern district of California and within the jurisdiction of this honorable court, did knowingly, wilfully, and unlawfully deposit and cause to be deposited in the United States post-office at the said city of Los Angeles, county and district aforesaid, for delivery a certain obscene, lewd, and lascivious letter addressed to "Mrs. Susan Budlong, box 661, Los Angeles, Cal.," which said letter in its terms, expressions, and contents is so obscene, lewd, lascivious, and filthy as that it would be offensive to the public morals and the dignity of this court if set forth in full in this indictment, and for that reason the grand jurors aforesaid state, as aforesaid, that the said letter is not set out herein; that said letter is dated "Los Angeles, Cal., Nov. 1st, 1893," and commences with the words following, to wit: "Mrs. S. B.: 2 Yours at hand. This is a delicate matter, and it is necessary that I should use every proper precaution as to who I should let into the secret," etc., and concludes with the words, "I am of the male sex. Yours trustfully, Spero; address as before;" the said letter so as aforesaid written being then and there unmailable matter by reason of the indecent character of its contents—

Contrary to the form of the statutes of the United States in such cases made and provided and against the peace and dignity of the said United States.

And the grand jurors aforesaid on their oath aforesaid do further present—

That A. D. Andrews, late of the southern district of California, heretofore, to wit, on the 3rd day of November, in the year of our Lord one thousand eight hundred and ninety-three, at the city of Los Angeles, county of Los Angeles, within the southern district of California and within the jurisdiction of this honorable court, did knowingly, wilfully, and unlawfully deposit and cause to be deposited in the United States post-office at said city of Los Angeles, county and district aforesaid, for delivery a certain obscene, lewd, and lascivious letter addressed to "Mrs. Susan H. Budlong, box 661, Los Angeles, Cal," which said letter in its terms, expressions, and contents is so obscene, lewd, lascivious, and filthy as that it would be offensive to the public morals and the dignity of this court if set forth in full in this indictment, and for that reason the grand jurors aforesaid state that the said letter is not set out herein; that 3 said letter is dated "Los Angeles, Cal., Nov. 3rd, 1893," and commences with the words following, to wit: "Mrs. S. H. B.: Yours at hand. I well understood that you were little prepared for my last missive," etc., and concludes, "I am very truly, A. D. A., 313 N. Broadway;" the said letter so written as aforesaid being then and there unmailable matter by reason of the indecent character of its contents—

Contrary to the form of the statutes of the United States in such

case made and provided and against the peace and dignity of the said United States.

GEORGE J. DENIS,
United States Attorney.

Names of witnesses examined before the grand jury on finding the foregoing indictment: M. H. Flint, W. B. Gard, Thos. A. Lewis.

(Endorsed:) No. 582. United States district court, southern district of California. The United States of America *vs.* A. D. Andrews. Indictment for violation of § 3893, R. S. A true bill. A. Workman, foreman. Presented and filed in open court this 18th day of November, A. D. 1893. E. H. Owen, clerk. George J. Denis, United States attorney.

4 In the District Court of the United States in and for the Southern District of California.

UNITED STATES OF AMERICA, Plaintiff,
vs.
A. D. ANDREWS, Defendant.
} Demurrer to Indictment.

Now comes the defendant in the above-entitled action and demurs to the indictment herein on the following ground, to wit:

That the facts stated in the indictment do not constitute an offence against the laws of the United States.

Wherefore, for want of a sufficient indictment in this behalf, the said defendant prays judgment that by an order of this court he may be dismissed and discharged from the said charge in said indictment specified.

J. MARION BROOKS,
Attorney for Defendant.

(Endorsed:) In the district court of the U. S. in and for the southern district of California. United States of America, plaintiff, *vs.* A. D. Andrews, defendant. Demurrer to indictment. Received copy of within dem*m.* this 27 day of Nov., 1893. George J. Denis, O. L., U. S. dist. att'y. Filed November 27, 1893. E. H. Owen, clerk. J. Marion Brooks, attorney for defendant.

5 In the District Court of the United States in and for the Southern District of California.

UNITED STATES OF AMERICA
vs.
ARTHUR D. ANDREWS.
} No. 582. Violation of Sec. 3893, R. S.

The United States attorney appearing for the Government; defendant present in court, in custody of the United States marshal, without his attorney.

In this cause a demurrer to the indictment having been heretofore submitted to the court, *and* the court, having fully considered

the same and being fully advised in the premises, now files its written opinion overruling the demurrer and orders that the setting of the cause for trial be passed until December 7th, 1893, at 10.30 o'clock a. m.

December 6th, 1893.

6 In the District Court of the United States in and for the Southern District of California.

THE UNITED STATES OF AMERICA *vs.* ARTHUR D. ANDREWS. } No. 582. Violation of Sec. 3893, R. S.

The United States attorney is present for the Government, J. Marion Brooks, Esq., appearing for the defendant. The defendant is present, in custody of the United States marshal.

On motion of the United States attorney, defendant is called and pleads "not guilty," which plea is entered of record, and by consent it is ordered that the trial of the cause be set for December 22nd, 1893, at 10.30 o'clock a. m.

December 7th, 1893.

7 In the District Court of the United States in and for the Southern District of California.

UNITED STATES OF AMERICA *vs.* ARTHUR D. ANDREWS. } No. 582. Violation of Sec. 3893, R. S.

George J. Denis, Esq., United States attorney, appearing for the Government; the defendant present, in custody of the U. S. marshal, with his attorney, J. Marion Brooks, Esq.

This cause coming on regularly for trial and respective counsel announcing themselves as ready, it is ordered that the trial proceed.

Upon motion of J. Marion Brooks, Esq., attorney for defense, it is ordered that John D. Campbell be and he is sworn as reporter to report the testimony and proceedings of this trial, and that the name of A. C. Broderson, Esq., be entered as associate counsel herein.

The following 12 names of jurors are drawn, called, and the jurors are sworn on *voir dire:* William B. Stewart, Jr., Isaac N. Wilson, John Bloeser, Joshua G. De Turk, Ezra E. Overholtzer, Charles A. Leighton, George W. McClure, Sherman Smith, Francis O. Wyman, Charles E. White, George W. Wolfe, and Theodore Wiesendanger.

Upon examination, Isaac N. Wilson, Charles A. Leighton, George W. McClure, and Francis O. Wyman are challenged peremptorily by defense and excused, and Sherman Smith is challenged peremptorily by the U. S. attorney & excused, the remaining
8 seven jurors being respectively accepted and sworn to try the case.

The names of George Sinsabaugh, James H. Denham, Peter Stone, John H. Schumacher, and M. F. O'Dea are drawn, called, and the jurors are sworn on *voir dire*. Upon examination, George Sinsabaugh and James H. Denham are challenged peremptorily by defendant's counsel and excused; also M. F. O'Dea is challenged peremptorily by the U. S. attorney and excused, Peter Stone and John H. Schumacher having been respectively accepted and sworn to try the case. The names of John R. Smurr, Thomas F. Joyce, and Charles R. Davidson are drawn, called, and the jurors sworn on *voir dire*. Upon examination, John R. Smurr and Charles R. Davidson are accepted & sworn to try the case and Thomas F. Joyce is challenged peremptorily by the U. S. attorney and excused. The name of James Booth is then drawn, called; the juror is sworn on *voir dire*, examined, challenged peremptorily by the defense, and excused; likewise Charles C. Bonnell and Samuel S. Wallace. The name of Levi R. Darby is drawn, called; the juror is sworn on *voir dire*, examined, accepted, and sworn to try the case.

The jurors not impanneled herein are excused until Feb'y 13th, 1894, at 10.30 a. m.

The jury as impanneled and sworn to try the case is as follows:

William B. Stewart, Jr.,	Theodore Wiesendanger,
John Bloeser,	Peter Stone,
Joshua G. De Turk,	John H. Schumacher,
Ezra E. Overholtzer,	John R. Smurr,
Charles E. White,	Charles R. Davidson,
Levi R. Darby,	George W. Wolfe.

9 The indictment is then read and the plea of not guilty is stated to the jury.

J. H. Humphreys is called, sworn, and testifies for the Government.

Government Exhibits ("1") (newspaper) and "2" (card) offered, admitted, and filed.

M. H. Flint is called, sworn, and testifies for the Government.

Government Exhibits 3, 5, 7, 9, 11, 13 (envelopes), and 4, 6, 8, 10, 12, 14 (letters) offered, admitted, and filed.

Mrs. Sarah Boyer is called, affirmed, and testifies for the Government.

W. B. Gard is called, sworn, and testifies for the Government.

It now being the hour of 12.30 o'clock p. m., a recess is taken until 2 p. m. of this day, and the jurors and witnesses are instructed to return at that hour.

Now, at the hour of 2 o'clock p. m., court reconvenes, parties appearing in court; the defendant present in custody of the marshal; the jury is called and all answer.

Thomas A. Lewis, W. B. Gard, Henry V. Van Dusen, and Frank R. Liddell are called, sworn, and testify for the Government, and the Government then rests.

Now comes the defendant, by counsel, and moves the court to instruct the jury to acquit the defendant, which is argued, and the motion is denied; to which ruling of the court the defendant excepts.

H. J. Moss, F. M. Parker, August Finley, and John Garvey are called, sworn, and testify for the defendant.

F. M. Parker is recalled and testifies for defendant.

Arthur D. Andrews, the defendant, is called, sworn, and testifies in his own behalf.

The defendant then rests his case.

There being no further testimony, the case is argued by the U. S. attorney for the Government, by J. Marion Brooks, Esq., for the defendant, and by the U. S. attorney, who closes.

10 The jury is instructed orally by the court and counsel for defendant excepts to all instructions given by the court and to the refusal of the court to give certain written instructions asked for by defendant's attorney.

At 4 o'clock p. m. the jury retire, in custody of the U. S. marshal, to consider of their verdict, and at the hour of 4.55 o'clock p. m. comes the jury, and, their names being called, all answer. Upon being asked if they have agreed upon a verdict they reply that they have, and their foreman presents and reads the following verdict:

"In the District Court of the United States in and for the Southern District of California.

UNITED STATES OF AMERICA
vs.
ARTHUR D. ANDREWS. } No. 582.

We, the jury in the above-entitled cause, find the defendant, Arthur D. Andrews, guilty as charged in the indictment.

Los Angeles, Feb'y 9th, 1894.

J. G. DE TURK, *Foreman.*

And we recommend the defendant to the mercy of the court on account of his youth.

J. G. DE TURK, *Foreman.*"

The verdict is then recorded and read to the jury and by them approved as recorded. The defendant is remanded to the custody of the U. S. marshal and his sentence is set for Monday, February 12th, 1894, at 10.30 a. m., and the jury is discharged herein and excused until Feb'y 13th, 1894, at 10.30 a. m. Counsel for

11 defendant excepts to the verdict of the jury.

February 9th, 1894.

12 In the District Court of the United States in and for the Southern District of California.

UNITED STATES OF AMERICA
vs.
ARTHUR D. ANDREWS. } No. 582.

We, the jury in the above-entitled cause, find the defendant, Arthur D. Andrews, guilty as charged in the indictment.

Los Angeles, Feb'y 9th, 1894.

J. G. DE TURK, *Foreman.*

And we recommend the defendant to the mercy of the court on account of his youth.

J. G. DE TURK, *Foreman.*

(Endorsed:) U. S. district court, southern district of California. United States of America *vs.* Arthur D. Andrews. Verdict. Filed February 9th, 1894. E. H. Owen, clerk.

13 In the District Court of the United States in and for the Southern District of California.

UNITED STATES OF AMERICA, Plaintiff,
vs.
ARTHUR D. ANDREWS, Defendant.
} Instructions for Defendant.

The jury are instructed by the court that a large distinction is observed between civil and criminal cases in respect to the degree or quantity of evidence necessary to justify the jury in finding a verdict against the defendant. In civil cases the juror is to find for the person in whose favor the evidence preponderates and is not free from reasonable doubt; but in criminal cases the defendant is entitled to the full benefit of the legal presumption of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. In criminal cases the jury cannot convict the defendant merely because they believe that the evidence is such that any man of prudence would act upon it in his own affairs, even of the greatest importance. Men frequently act in the grave and important concerns with reference to business matters without a firm conviction that the conclusion upon which they proceed to act was correct, before having deliberately mastered all the facts and circumstances known to them; they form a conclusion upon which they proceed to act, though they be not fully convinced of the
14 correctness of said conclusion. This degree of certainty is wholly insufficient to authorize a verdict of guilty in criminal cases. In such cases the jury should be perfectly convinced of the correctness of their conclusion that the person is guilty, and that conclusion should be so clear and so strong as to exclude from your minds all reasonable doubt that such determinations are correct.

The jury are instructed that if weaker and less satisfactory evidence is offered, when it appears that more satisfactory evidence was in the power of the Government to introduce, the evidence thus offered should be viewed with distrust.

The jury are instructed that if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong; and therefore, if, in such a case, you have any reasonable doubt as to which conclusion the chain of circumstances leads, a reasonable doubt would be created in your mind and you should give the defendant the benefit of such doubt and acquit him.

A reasonable doubt is not a vague, shadowy, or imaginary doubt,

but is the state of the juror's mind which, after entire consideration and condensation of all the evidence and circumstances surrounding the case, *that* leaves the mind of the juror in that condition that he can feel an abiding conviction to a moral certainty of the truth of the charge that the defendant is guilty.

The jury are instructed that an inference of fact, when it does not arise as a presumption of law, must be drawn by the jury, whose duty it is solely to pass upon the sufficiency or the insufficiency of the evidence.

People *vs.* Masser Smith, 88 Cal., 244.

The court instructs the jury that a criminal intent is always necessary to constitute a crime, and when such criminal intent does not appear, then the act complained of cannot be deemed a crime.

The court instructs the jury that, under the law, no juror should convict a citizen or citizens of crime upon mere presumption, however strong, or merely because there is a preponderance of all the evidence in the case against him, or simply because there is a strong reason to suspect that he is guity; but before the jury can lawfully convict a defendant they must be convinced of his guilt beyond all reasonable doubt and to a moral certainty.

The court instructs the jury that, whatever the condition or conduct of the defendant may be, the law presumes that he is innocent of the crime charged against him until the contrary is proven beyond a reasonable doubt and to a moral certainty. In this respect and so far as the crime alleged in the indictment is concerned he stands before the law as the peer of any man, however virtuous or honorable. This presumption of innocence which the law imposes cannot be done away with except by the force of evidence, which shall satisfy your minds beyond a reasonable doubt and to a moral certainty of the defendant's guilt.

In cases affecting the life or liberty of a person the evidence must be so conclusive and the presumption so strong as to exclude every reasonable doubt of the guilt of the defendant.

The jury are instructed that the policy of our law deems it better that many guilty persons should escape than one innocent person should be convicted and punished; so that unless you can say, after a careful consideration of all the evidence in the case, that every material allegation of the indictment is proved beyond a reasonable doubt you shall find the defendant not guilty. (Sag. Int., p. 631, sec. 8.)

The jury are instructed that the good character of the defendant is a fact in the case tending to establish his innocence; therefore in the present case the good character of the defendant, if proven to your satisfaction, is to be considered by you in connection with the other facts and circumstances in this case, and as to whether a person who had prior to the alleged crime sustained a good character would have committed such a crime. (Sackett's Instruction.)

The jury are instructed that the terms "lewd," "obscene," and "lascivious" as defined in the statutes and as to whether the letter or letters of which defendant is accused of sending through the mail

was a letter of such character as to deprave and corrupt the mind of the party receiving the same, and this question is a fact of which you are the sole judges.

38 Fed., p. 502.

The jury are instructed that there is a vast difference between letters of a coarse and vulgar character and those grossly libelous, having no tendency to corrupt the morals of those receiving the same, and such letters are not lewd and lascivious, and the question as to whether the letter was lewd and lascivious is a question of fact of which you are the sole judges.

U. S. *v.* Males, 51 Fed., 41.

17 The jury are further instructed that the testimony of one Flint, who has testified in this case, should not be received or considered by you, and that such testimony is not permitted to be received by the jury, it appearing from the evidence that the said Flint did instigate and encourage the defendant to commit the crime at bar if committed at all before the defendant had formed any intent to commit such crime, and the said Flint, being an officer of the United States, cannot thus instigate the commission of a crime and the Government take advantage of his unlawful act.

People *vs.* Collins, 53 Cal., 185.

Thompson *vs.* State, 81 Amer. Decisions, 364.

38 Amer. Rep., 129.

(Endorsed:) U. S. *vs.* Andrews. Instructions refused. Filed Feb'y 9th, 1894. E. H. Owen, clerk. J. Marion Brooks, att'y for def't.

18 In the District Court of the United States in and for the Southern District of California.

UNITED STATES OF AMERICA *vs.* ARTHUR D. ANDREWS. } No. 582. Violation of Sec. 3893, R. S.

The U. S. attorney appearing for the Government; the defendant present in custody of the U. S. marshal, with his attorney, J. Marion Brooks, Esq. This being the hour fixed for the sentence of defendant, now comes J. Marion Brooks, Esq., his attorney, and moves the court to postpone the sentence herein until February 26th, 1894, at 10.30 a. m.; thereupon, with the consent of the U. S. attorney and good cause appearing therefor, it is ordered that the sentence of defendant be postponed and continued until Feb'y 26th, 1894, at 10.30 a. m. Defendant is then remanded.

February 12th, 1894.

19 In the District Court of the United States in and for the Southern District of California.

UNITED STATES OF AMERICA
vs.
ARTHUR D. ANDREWS. } No. 582. Violation of Sec. 3893, R. S.

The U. S. attorney present for the Government; the defendant present in court, in custody of the U. S. marshal, with his attorney, J. Marion Brooks, Esq.

This being the time fixed for the sentence of the defendant, now, on motion of J. Marion Brooks, Esq., attorney for defendant, and good cause appearing therefor, it is ordered that the sentence of defendant be, and the same hereby is, postponed and continued until Monday, March 5th, 1894, at 10.30 o'clock a. m.

February 26th, 1894.

20 In the District Court of the United States of America in and for the Southern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
ARTHUR D. ANDREWS, Defendant. } Motion in Arrest of Judgment.

Now comes the defendant and moves the court in arrest of judgment on the following grounds, to wit:

I.

On the ground that the facts stated in said indictment do not constitute a public offense.

II.

That the indictment does not conform substantially to the requirements of section 3893 of the Revised Statutes of the United States of America; (*a*) that said indictment does not state the alleged offence in ordinary and concise language and in such a manner as to enable a person of ordinary understanding to know what is intended; (*b*) that the indictment is not direct and certain as regards the alleged offence; (*c*) that the indictment is not direct and certain as regards the particular circumstances of the alleged offence charged.

III.

That the evidence is insufficient to warrant a conviction of the defendant.

Respectfully submitted.

J. MARION BROOKS,
Attorney for Defendant.

21 (Endorsed:) No. 582. In the district court of the United States of America in and for the southern district of California. The United States of America, plaintiff, *vs.* Arthur D. Andrews,

defendant. Motion in arrest of judgment. Received copy of within motion this 5th day of March, 1894. George J. Denis, U. S. dist. att'y. Filed March 5th, 1894. E. H. Owen, clerk. J. Marion Brooks, attorney for defendant.

22 In the District Court of the United States of America in and for the Southern District of California.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
ARTHUR D. ANDREWS, Defendant.
} Motion for New Trial.

Now comes the defendant in the above-entitled action and moves the court to set aside and vacate the verdict herein and to grant the defendant a new trial on the following grounds, to wit:

I.

That the court has erred in the decisions of law during the course of the trial.

II.

That the court has misdirected the jury in matters of law.

III.

That the verdict is contrary to law.

IV.

That the verdict is contrary to the evidence.

Respectfully submitted.

J. MARION BROOKS,
Attorney for Defendant.

(Endorsed:) No. 582. In the district court of the United States of America in and for the southern district of California. The United States of America, plaintiff, *vs.* Arthur D. Andrews, defendant. Motion for new trial. Received copy of within motion this 5th day of March, 1894. George J. Denis, U. S. dist. att'y, attorney for pl'ff. Filed March 5th, 1894. E. H. Owen, clerk. J. Marion Brooks, attorney for defendant.

23 In the District Court of the United States in and for the Southern District of California.

UNITED STATES OF AMERICA
vs.
ARTHUR D. ANDREWS.
} No. 582. Violation of Sec. 3893, R. S.

George J. Denis, Esq., U. S. attorney, appearing for the Government; the defendant present in court, in custody of the U. S. marshal, with his attorney, J. Marion Brooks, Esq.

This being the time fixed for the sentence of defendant, now

comes J. Marion Brooks, Esq., his attorney, and presents and argues a motion in arrest of judgment and a motion for a new trial upon the grounds as set forth in said motion. Said motions are overruled; to which ruling of the court defendant excepts.

The defendant is called for sentence and stands up; he is asked if he has anything to say why sentence should not be now passed upon him, to which he replies that he has not, and the court pronounces sentence & judgment as follows:

It is ordered that the defendant, Arthur D. Andrews, be imprisoned in the State prison, at San Quentin, California, for the term of three (3) years at hard labor, and that he pay a fine of one thousand dollars; he is then remanded.

The defendant's attorney excepts to the judgment of the court.

On motion of defendant's attorney, it is ordered that all proceedings herein be stayed until March 8th, 1894.

March 5th, 1894.

24 In the District Court of the United States in and for the Southern District of California.

UNITED STATES OF AMERICA
vs.
ARTHUR D. ANDREWS. } No. 582.

I, E. H. Owen, clerk of the district court of the United States in and for the southern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled cause.

[SEAL.] Attest my hand and the seal of said court this 5th day of March, A. D. 1894.

E. H. OWEN, *Clerk.*

(Endorsed:) No. 582. U. S. district court, southern district of California. United States of America *vs.* Arthur D. Andrews. Judgment-roll. Filed March 5th, 1894. E. H. Owen, clerk.

25 Personal preventatives for married ladies of a financial standing. No fake but a reality. For curiosity's sake address Spero, box 60, this office. 11–1 1t

(Endorsed:) No. 582. U. S. district court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Government's Ex. 1. Filed Feb'y 9th, 1894. E. H. Owen, clerk.

26 Present this card:

LOS ANGELES, CAL., ——, 189–.

The bearer is hereby entitled to receive any communications addressed Spero, box 60, for — days.

LOS ANGELES HERALD.

(Endorsed:) 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. "2." Filed Feb'y 9, 1894. E. H. Owen, clerk.

27 (Envelope addressed:) Spero, box 60, Herald office, Los Angeles, Calif.
Postmarked: Los Angeles, Cal., Nov. 1, 4 p. m., '93.
(Endorsed:) No. 582. Ex. 3. U. S. district court, so. dist. of Calif. Gov'm't's Ex. "3." United States *vs.* Arthur D. Andrews. Filed Feb'y 9, 1894. E. H. Owen, clerk.

(*Letter.*)

LOS ANGELES, CALIF., *Nov. 1st*, 1893.

Spero, box 60, Herald office:

I saw your advertisement in this morning's Herald I am a married woman and a stranger here my husband is East and the preventative advertised by you is therefore absolutely necessary As far as finances are concerned I assure you I have plenty for any expenses necessary it is the preventative I want.

Yours truly, SUSAN BUDLONG,
P. O. Box 661, Los Angeles, Cal.

(Endorsed:) No. 582. Ex. 2. U. S. district court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. "4." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

28 (Envelope addressed:) Susan Budlong, box 661, Los Angeles, Cal.
Postmarked: Los Angeles, Cal., Nov. 2, 1 p. m., '93.
(Endorsed:) No. 582. Ex. 5. U. S. district court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. 5. Filed Feb'y 9th, 1894. E. H. Owen, clerk.

Ex. 4.

(*Letter.*)

H. V. V. D.
M. H. F., 2 Nov., '93.

LOS ANGELES, CAL., *Nov. 1st*, 1893.

Mrs. S. B.:

Yours at hand:—This is a delicate matter, and it is necessary that I should use every proper precaution as to who I let into the secret. Notwithstanding the very best results are obtainable, beyond all imagination I therefore require that you write again to assure me that I may address you freely ere I let you into the secret, with the assurance that you will keep the same a secret, should you not see fit to follow my instructions.

I assure you there is nothing to fear. But on the other hand there is everything to enjoy, so far as love and sexualism are concerned.

I therefore await your pleasure to reveal all to you, in order that you may know who you address. I am of the male sex.

Yours trustfully, SPERO.

Address as before.

29 (Endorsed:) No. 582. U. S. district court, southern dist. of Calif. United States of America *vs.* Arthur D. Andrews. Gov'm't's Ex. "6." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

30 (Envelope addressed:) Spero, box 60, Herald office, Los Angeles, California.
Postmarked: Los Angeles, Cal., Nov. 2, 4 p. m., '93.

Endorsed: No. 582. U. S. dist. court, so. dist. of Calif. Gov'm't's Ex. 7. United States *vs.* Arthur D. Andrews. Filed Feb'y 9th, 1894. E. H. Owen, clerk.

Ex. 6.

(*Letter.*)

LOS ANGELES, CAL., *Nov. 2nd*, 1893.

Spero, box 60, Herald office:

I received your letter in reply to mine and all I have to say is if you have what you advertise I want it and am willing to pay whatever it costs.

Very truly yours, SUSAN H. BUDLONG.

P. O. box 661, Los Angeles, Cal.

(Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. 8. Filed Feb'y 9th, 1894. E. H. Owen, clerk.

31 (Envelope addressed:) Susan H. Budlong, box 661 Los Angeles, Cal.
Postmarked: Los Angeles, Cal., Nov. 2, 10 p. m., '93.

M. H. F.
H. V. V. D.
Ex. 9.

(Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't Ex. "9." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

Ex. 8.

(*Letter.*)

M. H. F.
H. V. V. D.

LOS ANGELES, CAL., *Nov. 2nd*, 1893.

Mrs. S. H. B.:

Yours at hand. And to be brief, circumstances in life has deprived me of the ability of increasing the population, but left me in a most admirable condition to please the fair sex, to their entire satisfaction. I am young, good looking, and possess a splendid form. This is my first attempt, the East has been my home until the last 10 months. The extreme dullness of *of* times has led me to this

step, knowing that many a lady would be glad for one such as I am, and as you are the first to reply, I give you the preference. Should this meet your demand and you should wish to see me without my seeing you, I can be walking anywhere you may wish at any hr., or meet you anywhere, or meet you and bring you to my room any night. Should I not prove satisfactory, after a tri-le, you will not have to fear and not to pay. Address as before.

Yours if you like, SPERO.

32 (Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States of America *vs.* Arthur D. Andrews. Gov'm't's Ex. "10." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

33 (Envelope addressed:) Spero, box 60, Herald office, Los Angeles, Calif.

Endorsed: No. 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. "11." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

Ex. 10.

(*Letter.*)

LOS ANGELES, CAL., *Nov.* 3*r*-, 1893.

Spero, box 60, Herald office, city:

I received your letter and was shocked at what you wrote. It is not what I expected—but maybe it is better as it is, at least I will tell you what I think after I have seen you—but how do I know what you say of yourself is true? if you will go to the post-office between half past 3 and quarter to four tomorrow afternoon (Saturday) and stand at the window nearest the entrance that looks out on Fifth St. side. Have a red pocket handkerchief in your upper outside coat pocket so I can recognize you, don't try to know me or speak to me if you suit me I will let you know.

Yours truly, SUSAN H. BUDLONG,
P. O. Box 661, *Los Angeles, California.*

(Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. "12." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

34 (Envelope addressed:) Mrs. Susan H. Budlong, box 661, Los Angeles, Cal.
Postmarked Los Angeles, Cal., Nov. 3, 10 p. m., '93.

Endorsed: 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. "13." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

Ex. 12.

(*Letter.*)

M. H. F.
H. V. V. D.

Los Angeles, Cal., *Nov.* 3th, 1893.

Mrs. S. H. B.:

Yours at hand. I well understood that you were little prepared for my last missive, but I ap-rehend that you were impatient, therefore, the abruptness of the explanation, but I trust you will not think me too bold, for I am not so. As to the truth of what I pen-ed you I can only refer you to Dr. De Crow Newark O. also to my character, but the latter can as well be detected by yourself by a short conversation with me, if not from my looks. You might infer from my condition that I should not be passionate enough to *sot* the fair sex, but one tri-*le* will convince you of the contrary. Now if I *soot* you and you should want to meet me Sunday night a letter in the evening's col-ection of the mail will reach me Sunday morn at #313 N. Broadway or any note drop-ed on the floor or given me will be attended to*o* Sat. night, or as I stated if you will come to my room, all is safe. With these ass*h*urances I am very truly,

A. D. A.,
313 *N. Broadway.*

(Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. (14). Filed Feb'y 9th, 1894. E. H. Owen, clerk.

35 Los Angeles, Cal., *Nov.* 1*st*, 1893.

Mrs. S. B.:

Yours at hand

This matter is of a very peculiar nature and requires caution but the very best results can be obtained, it is an undertaking of my own, and I am rather timid ere it should be mistaken, and I should not have the heart to try again, therefore I should like to hear from you again before letting you into the secret hoping to hear from you by return mail I await your pleasure

Trust*i*fully yours SPERO.

Address as befor-.

(Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States *v.* Arthur D. Andrews. Gov'm't's Ex. "15." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

36 Ex. 17.

This is a delicate matter and is necessary that I should use every precaution, as to who I let into the secret, notwithstanding the very best results can be obtained b-yond anything that any one could

conceive, I therefore require that you write again to insure me that I may address you freely ere I° let you into the secret and I as-ure there is nothing to fear, but on the other hand, there is everything to enjoy so far as love and sexualism are concerned

I therefore await your pleasure to reveal all to you

Yours trustfully SPERO.

(Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. "16." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

37 Ex. 18.

What I have it——

and to be brief, circumstances in life has deprived me of the ability of increasing the population, but left me in good condition to please the fair sex to perfect satisfaction, I am young good looking, splendid form, this is my first attempt and as you were the first to apply I give you the prefference the dull times have compel-ed me to make an effort to get a livel*y*hood here o*t* return East, where I am s*h*ure of being well treated but where the climate is too cold to soot me after getting *o* taste of this if this meets with your approval name some place and time where we can me-t should you like to look at me without my seeing you I can be walking in a place to soot, or you can come to my room any eve by *anan*

(Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. "17." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

38 In the District Court of the United States for the Southern District of California.

UNITED STATES OF AMERICA, Plaintiff, *vs.* ARTHUR D. ANDREWS, Defendant. } Statement on Appeal and Bill of Exceptions.

Be it remembered that on the 9th day of February, 1894, the above-entitled action came on for hearing before the above-entitled court, Hon. G. J. Denis appearing as counsel for the Government and Hon. J. Marion Brooks appearing as counsel for defendant; whereupon the following proceedings were had:

J. H. HUMPHREYS being called as a witness for the Government, defendant objected to any testimony being given in the case, on the ground that the indictment does not state facts sufficient to constitute a crime or public offence. The objection was overruled by the court; to which ruling the defendant excepted.

The witness, having testified that he was connected with the Los Angeles Herald, a newspaper, further testified: "The defendant came into the Herald office one day while I was on duty, and he

Ex. 12.

(*Letter.*)

M. H. F.
H. V. V. D.

LOS ANGELES, CAL., *Nov.* 3th, 1893.

Mrs. S. H. B.:

Yours at hand. I well understood that you were little prepared for my last missive, but I ap-rehend that you were impatient, therefore, the abruptness of the explanation, but I trust you will not think me too bold, for I am not so. As to the truth of what I pen-ed you I can only refer you to Dr. De Crow Newark O. also to my character, but the latter can as well be detected by yourself by a short conversation with me, if not from my looks. You might infer from my condition that I should not be passionate enough to *sot* the fair sex, but one tri-*le* will convince you of the contrary. Now if I *soot* you and you should want to meet me Sunday night a letter in the evening's col-ection of the mail will reach me Sunday morn at #313 N. Broadway or any note drop-ed on the floor or given me will be attended to*o* Sat. night, or as I stated if you will come to my room, all is safe. With these ass*h*urances I am very truly,

A. D. A.,
313 *N. Broadway.*

(Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. (14). Filed Feb'y 9th, 1894. E. H. Owen, clerk.

35 LOS ANGELES, CAL., *Nov.* 1*st*, 1893.

Mrs. S. B.:

Yours at hand

This matter is of a very peculiar nature and requires caution but the very best results can be obtained, it is an undertaking of my own, and I am rather timid ere it should be mistaken, and I should not have the heart to try again, therefore I should like to hear from you again before letting you into the secret hoping to hear from you by return mail I await your pleasure

Trust*i*fully yours SPERO.

Address as befor-.

(Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States *v.* Arthur D. Andrews. Gov'm't's Ex. "15." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

36 Ex. 17.

This is a delicate matter and is necessary that I should use every precaution, as to who I let into the secret, notwithstanding the very best results can be obtained b-yond anything that any one could

conceive, I therefore require that you write again to insure me that I may address you freely ere I let you into the secret and I as-ure there is nothing to fear, but on the other hand, there is everything to enjoy so far as love and sexualism are concerned

I therefore await your pleasure to reveal all to you

Yours trustfully SPERO.

(Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. "16." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

37 Ex. 18.

What I have it——

and to be brief, circumstances in life has deprived me of the ability of increasing the population, but left me in good condition to please the fair sex to perfect satisfaction, I am young good looking, splendid form, this is my first attempt and as you were the first to apply I give you the preiference the dull times have compel-ed me to make an effort to get a livel*y*hood here o*t* return East, where I am s*h*ure of being well treated but where the climate is too cold to s*oo*t me after getting *o* taste of this if this meets with your approval name some place and time where we can me-t should you like to look at me without my seeing you I can be walking in a place to s*oo*t, or you can come to my room any eve by *anan*

(Endorsed:) No. 582. U. S. dist. court, so. dist. of Calif. United States *vs.* Arthur D. Andrews. Gov'm't's Ex. "17." Filed Feb'y 9th, 1894. E. H. Owen, clerk.

38 In the District Court of the United States for the Southern District of California.

UNITED STATES OF AMERICA, Plaintiff, *vs.* ARTHUR D. ANDREWS, Defendant. } Statement on Appeal and Bill of Exceptions.

Be it remembered that on the 9th day of February, 1894, the above-entitled action came on for hearing before the above-entitled court, Hon. G. J. Denis appearing as counsel for the Government and Hon. J. Marion Brooks appearing as counsel for defendant; whereupon the following proceedings were had:

J. H. HUMPHREYS being called as a witness for the Government, defendant objected to any testimony being given in the case, on the ground that the indictment does not state facts sufficient to constitute a crime or public offence. The objection was overruled by the court; to which ruling the defendant excepted.

The witness, having testified that he was connected with the Los Angeles Herald, a newspaper, further testified: "The defendant came into the Herald office one day while I was on duty, and he

wanted to know if I had an advertisement which he had inserted in the Herald and paid for, and why it wasn't put in. I looked it up on the files of the paper and found that it had only been put in once."

The Government offered in evidence the said advertisement,
39 which is as follows: "Preventive for married ladies of a financial standing. No fake, but a reality. For curiosity's sake, address Spero, box 60, Herald office."

Defendant objected to the offer as irrelevant, immaterial, and incompetent. The objection was overruled by the court; to which defendant excepted, and the advertisement was read in evidence.

M. H. FLINT, called on the part of the Government, testified substantially as follows: "I am a post-office inspector. Upon reading the advertisement in the paper I answered it by letter. I did not write the letter, but I sent and mailed it. M. H. Flint is Susan H. Budlong. This (referring to letter shown witness) is a copy made by myself. The person who wrote it, the postmaster of this city, and I saw this letter. Susan Budlong is a fictitious name assumed by me."

The Government offered in evidence the envelope marked Government Exhibit "3" and the letter marked Government Exhibit "4."

Defendant objected thereto as incompetent, irrelevant, and immaterial; that it is a letter written by a public officer of the United States; that it is not in the name of that officer, and that the letter was intended to induce a party to violate the laws of the United States. The objection was overruled by the court; to which ruling defendant excepted.

The letter was read to the jury for the Government, and is as follows:

"LOS ANGELES, CALIF., *Nov. 1st*, 1893.

Spero, box 60, Herald office:

I saw your advertisement in the Morning Herald. I am a married woman and a stranger here. My husband is East, and
40 the preventive advertised by you is absolutely necessary. As far as finances are concerned I assure you I have plenty for any expenses necessary. It is the preventive I want.

Yours truly, SUSAN BUDLONG,
P. O. Box 661, *Los Angeles, Cal.*"

The WITNESS (continuing): "The envelope and letter now shown me were received by me through the United States mail in answer to the last letter."

The Government offered in evidence the envelope marked Government Exhibit "5" and the letter marked Government Exhibit "6," last referred to. The defendant objected to each as incompetent, irrelevant, and immaterial; that the letter is a sealed one, not addressed to the witness; that it is not such a letter as is prohibited

by the statutes of the United States from being transmitted through the mails of the United States, and that its transmission through the mails is permitted by section 3893 of the Revised Statutes of the United States. The objections were overruled by the court; to which ruling defendant excepted.

The letter was read to the jury for the Government, and is as follows:

"LOS ANGELES, CAL., *Nov. 1st*, 1893.

Mrs. S. B.:

Yours at hand. This is a delicate matter, and it is necessary that I should use every precaution as to who I let into the secret, yet, notwithstanding, the very best results are obtainable beyond all imagination. I therefore require that you write again to assure me that I may address you freely ere I let you into the secret, with the assurance that your letter may be the same, and still you can see fit to follow my instructions. I assure you there is nothing to fear, but on the other hand there is everything to enjoy so far
41 as love and sexualism is concerned. I therefore await your pleasure to reveal all to you in order that you may know whom you address. I am of the male sex.

Yours trustful-y, SPERO.

Address as Spero."

The WITNESS (continuing): "I replied to that letter. The letter and envelope now shown me are the ones used in my reply."

The Government offered in evidence the envelope marked Government Exhibit "7" and the letter marked Government Exhibit "8," last referred to. The defendant objected to each on the same ground stated in the preceding objection. The objections were overruled by the court; to which ruling the defendant excepted.

The letter was read to the jury for the Government, and is as follows:

"LOS ANGELES, CAL., *Nov. 2nd*, '93.

Spero, box 60, Herald office:

I received your letter in reply to mine and all I have to say is that if you have what you advertise, I want it and will willingly pay whatever it costs.

Very truly yours, SUSAN BUDLONG,
P. O. Box 661, *Los Angeles, Cal.*"

The WITNESS (continuing): "The envelope and letter now shown me were received by me in answer to the last letter."

The Government offered in evidence the envelope marked Government Exhibit "9" and the letter marked Government Exhibit "10," last referred to. The defendant objected to each as incompetent, irrelevant, and immaterial; that the letter was a sealed one, addressed to a fictitious person; that it does not appear that the letter was written by the defendant, and, if so written, it was written

at the instigation of an officer of the United States. The
42 objections were overruled by the court; to which ruling the defendant excepted.

The letter was read to the jury for the Government, and is as follows:

"Mrs. S. B.:

Yours at hand, and to be brief, circumstances in life have deprived me of the ability of increasing the population, but left me in a most admirable condition to please the fair sex to their entire satisfaction. I am young good-looking, and possess a splendid form. This is my first attempt. The East has been my home until the last ten months. The eastern dullness of the time has led me to this step knowing that many a lady would be glad for one such as I am, and as you are the first to reply I give you the preference. Should this meet your demand and you wish to see me without my seeing you, I can be walking anywhere you may wish, at any hour, or meet you and bring you to my room any night. Should I not prove satisfactory after a trial you will have naught to fear and naught to pay. Address as before.

Yours as you like, SPERO."

The WITNESS (continuing): "I replied to that letter. The letter and envelope now shown me are the ones used in my reply."

The Government offered in evidence the envelope marked Government Exhibit "11" and the letter marked Government Exhibit "12," last referred to. The defendant objected to each on the same grounds stated in the preceeding objection, and on the further ground that prior to this time it was not shown that defendant had any intention to commit a crime. The objections were overruled by the court and defendant excepted.

43 The letter was read to the jury for the Government, and is as follows:

"LOS ANGELES, CAL., *Nov.* 3, 1893.

Spero, box 60, Herald office, city:

I received your letter and was shocked at what you wrote. It is not what I expected but maybe it is better as it is, at least I will tell you what I think after I have seen you, but how do I know what you say of yourself is true. If you will go to the post-office between half past three and a quarter of four tomorrow afternoon (Saturday) and stand at the window nearest the entrance that looks out on Fifth street, have a red pocket handkerchief in your upper outside coat pocket so I can recognize you. Don't try to recognize or speak to me. If you suit me I will let you know.

Yours truly, SUSAN H. BUDLONG,

"*P. O. Box* 661, *Los Angeles, Cal.*"

The WITNESS (continuing): "The envelope and letter now shown me were received by me through the United States mail in answer to the last letter."

The Government offered in evidence the envelope marked Government Exhibit "13" and the letter marked Government Exhibit "14," last referred to. The defendant objected to each on the same grounds stated in the preceeding objections. The objections were overruled by the court; to which ruling defendant excepted.

The letter was read to the jury for the Government, and is as follows:

"LOS ANGELES, CAL., *Nov. 3rd*, 1893.

Mrs. S. B.:

Yours at hand. I well understand that you are little prepared for my last missive but I apprehend that you are impatient, therefore the roughness of the explanation, but I trust that you will not think me too bold, for really I am not so. As to the truth of
44 what I pen you I can refer you to Dr. De Grow, Newark, Ohio, also to my character. But the latter can as well be detected by yourself after a short conversation with me, if not, from my looks. You might infer from my condition that I could not be passionate enough to suit the fair sex, but one trial will convince you to the contrary. Well, if I suit you and you should want to meet me Sunday night a letter in the evening selection of the mail will reach me Sunday morn at 103 N. Broadway, or any note dropped on the floor or given me will be attended to Saturday night, or as I stated, if you will come to my room all is safe. With these assu*a*rences,

I am very truly, A. D. A.,
313 *N. Broadway*."

Cross-examination:

The WITNESS: "I commenced the correspondence with this Spero in response to the advertisement. My object was to find out whether he had a preparation for me in the abortion business. I was acting under certain instructions. I opened the letters in the presence of the postmaster always. The publication given to these letters was given by me."

Mrs. SARAH ROYER, called for the Government, testified substantially as follows: "I know the defendant. At the time of his arrest he occupied a room at my house, 313 N. Broadway."

W. B. GARD, called for the Government, testified substantially as follows: "I am chief deputy in the United States marshal's office. On the day Deputy Marshal Frank R. Liddell served the warrant on the defendant I saw him sitting in the United States post-office near the Fifth-street window."

HENRY V. VAN DUZEN, called for the Government, testified substantially as follows: "I saw the letters testified to by Mr. Flint, received by him through the post-office, and recognize the
45 exhibit shown me as being the same."

FRANK R. LIDDELL, called for the Government, testified substantially as follows: "I arrested the defendant in the post-office corri-

dor, in the city of Los Angeles. He was standing at the side window, looking toward the register department. He had a sort of red handkerchief in his outside coat pocket. I searched him and found the receipt for the box in the Herald office and two letters on him. I went to defendant's room and found in the clothes' closet, in what seemed to be a shoe box, some three letters. I think they were duplicates, as they were written on yellow paper. I think Exhibits "15," "16," & "17" are the ones. I found that there were other persons rooming in the same room with the defendant."

At the conclusion of the evidence the Government rested its case.

Defendant moved the court to instruct the jury to acquit the defendant on the ground that if any offence had been committed it had been at the request of Mr. Flint, a Government officer, and on the further ground that the evidence is insufficient to connect the defendant with the alleged offence.

The motion was denied by the court; to which ruling defendant excepted.

AUGUST FIRMILA, called for the defence, *and* testified substantially as follows: "I had an appointment to meet the defendant at the post-office between half past three and four o'clock on the day of his arrest, but I could not fill my engagement."

JOHN GARVEY, called for the defence, testified substantially
46 as follows: "I have known the defendant since boyhood. I knew him in Newark, Ohio, and in this city. His reputation for truth, honesty, and integrity is good."

ARTHUR D. ANDREWS, the defendant, called for the defence, testified substantially as follows: "The advertisement in the Herald was put in by Aaron Armstrong, a friend of mine. He was with me in the office when I was making inquiries from Mr. Humphreys. I have known Armstrong about a month. My friends and I have endeavored to find him since my arrest, but we have been unable to do so."

Whereupon the case closed; thereupon the defendant requested the court to give the instructions to the jury as same appear in the record, which said request was by the court refused, and defendant excepted.

Defendant objected to all instructions given by the court.

Now comes the defendant and presents these his particular grounds of error and bill of exceptions:

1. The court erred in permitting the witness Flint to testify in said cause for the reason that said witness was an officer of the Government of the United States, and that the correspondence carried on was sealed and carried on for the sole purpose of obtaining evidence from the defendant upon which to base this prosecution.

2. The court erred in admitting the letters in evidence for the

reason that there is no evidence connecting the defendant with the writing or mailing of the same.

3. That said letters were not such letters as are prohibited from being transmitted, as provided, through the mails of the United States, is prohibited.

47 4. The court erred in admitting said letters in evidence for the reason that they were sealed and addressed to Susan Budlong, there being no such person as Susan Budlong in existence.

5. The court erred in its refusal to give the instructions asked for by the defendant.

6. The court erred in giving the instructions to the jury.

7. The court erred in its refusal to intruct the jury to acquit the defendant, for the reason that the evidence is insufficient to prove each and every essential element of the alleged offence.

8. The court erred in overruling the demurrer to the indictment.

Now comes the defendant and presents and serves this his bill of exceptions and statement on appeal and asks that said bill and statement be allowed, settled, and duly certified as such.

J. MARION BROOKS,
Attorney for Defendant and Appel-ant.

Dated this 31st day of May, 1894.

The plaintiff herein stipulates and certifies that he has examined the within bill of exceptions and statement on appeal and finds the same to be correctly engrossed.

GEORGE J. DENIS,
United States Attorney.

Settled and allowed as correct this 31st day of May, 1894.

E. M. ROSS,
Dist. Judge.

48 (Endorsed:) No. 582. In the district court of the United States in and for the southern district of California. United States of America, plaintiff, *vs.* Arthur D. Andrews, defendant. Bill of exceptions and statement on appeal. Filed May 31st, 1894. E. H. Owen, clerk. J. Marion Brooks, attorney for def't & app't.

49 At a stated term, to wit, the January term, A. D. 1894, of the district court of the United States of America in and for the southern district of California, held at the city of Los Angeles on Thursday, the 31st day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Present: The Honorable Erskine M. Ross, district judge.

UNITED STATES OF AMERICA
vs.
ARTHUR D. ANDREWS. } No. 582. Violation of Sec. 3893, R. S.

George J. Denis, Esq., U. S. attorney, present for the Government; defendant in court, in custody of the U. S. marshal, with his attorney, J. Marion Brooks, Esq.

In this cause the settlement of the defendant's bill of exceptions and statement on appeal having been adjourned and continued to this day, it is now ordered that the bill of exceptions and statement on appeal herein be, and the same is, settled and allowed, and that the appeal of defendant be allowed; it is further ordered that a stay of proceedings be granted pending said appeal.

Defendant's attorney moves the court to fix the amount of a bond on appeal and that the defendant be allowed to go on bail pending said appeal; which motion is denied by the court, and to which ruling defendant excepts.

He is then remanded to the custody of the marshal.

50 In the District Court of the United States for the Southern District of California.

UNITED STATES OF AMERICA, Plaintiff,
vs.
A. D. ANDREWS, Defendant.

The demurrer in this case raises the question whether a private sealed letter, upon the envelope of which there is nothing but the name and address of the person to whom it is sent, is within the prohibition of section 3893 of the Revised Statutes, as amended by the act of September 26, 1888—25 Stats., 496—by which amendment the word "letter" was included in the list of articles made non-mailable by reason of their obscene, lewd, lascivious, or otherwise improper character. In support of the demurrer the counsel for the defendant relies upon a very recent decision of the district court for the northern district of California (U. S. *v.* Wilson) in which it was held by Judge Morrow that such a letter does not come within the inhibition of the statute as amended in 1888. I regret to be obliged to differ from Brother Morrow in that respect. From his opinion, with which I have been favored, it appears that his conclusion is based upon the opinion of the Supreme Court in the case of The United States *vs.* Chase, 135 U. S., 255, and
51 particularly upon certain rules of construction there referred to by the court.

The indictment under consideration in that case was founded on section 3893 of the Revised Statutes, as amended by the act of July 12, 1876, 19 Stats., 90. The matter thereby excluded from the mails was thus described in the statute: "Every obscene, lewd, or lascivious book, pamphlet, picture, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion,

and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how or of whom or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed;" and the question presented to the court was whether the term "writing" included a sealed letter upon the envelope of which there was nothing but the name and address of the person to whom the letter was written. Upon that question the decision of the lower courts had been theretofore conflicting, some holding that it did and others that it did not.

In holding that the term "writing" did not include such a letter the Supreme Court said, among other things:

"In the statute under consideration the word 'writing' is used as one of a group or class of words—book, pamphlet, picture,
52 paper, writing, print—each of which ordinarily and *prima facie* understood to be a publication, and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated and marks each with the common quality indicated. It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute and not a private letter on the outside of which there is nothing but the name and address of the person to whom it is written. We do not think it a reasonable construction of the statute to say that the vast mass of postal matter known as 'letters' was intended by Congress to be expressed in a term so general and vague as the word 'writing,' when it would have been just as easy and also in strict accordance with all its other postal laws and regulations to say 'letters' when letters were me-nt, and the very fact that the word 'letters' is not specially mentioned among the enumerated articles in this clause is itself conclusive that Congress intended to exclude private letters from its operations."

The Supreme Court found a further argument in support of its view in the fact that the statute it was construing, after declaring by enumeration what articles should be non-mailable, added a separate and distinct clause, declaring that "every letter upon the envelope of which * * * indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed * * * shall not be conveyed in the mails, and the person knowingly or wilfully depositing the same in the mails shall be deemed guilty of a misdemeanor," etc. This distinctly additional clause, said the court, "specifically des-
53 ignating and describing the particular class of letters which shall be non-mailable, clearly limits the inhibitions of the statute to that class of letters alone whose indecent matter is exposed on the envelope."

All of this is cogent reasoning why the term "writing" in section

3893 of the Revised Statutes, as amended by the act of July 12, 1876, did not include a private sealed letter upon the envelope of which there is nothing but the name and address of the person to whom the letter is written, but I am unable to see that it is at all applicable to the amendment of September 26, 1888, by which not only the specific term "letter" was inserted in the statute, but the seperate and distinct clause of the act of July 12, 1876, declaring that "every letter upon the envelope of which * * * indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed * * * shall not be conveyed in the mails," was omitted, and prohibition in respect to delineations, epithets, etc., upon the envelope or outside cover or wrapper was made applicable to all matter otherwise mailable by law.

Congress was not content with the law of 1876, by which, as has been seen, a particular class of letters only was excluded from the mail, to wit, those upon the envelope of which indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written, and by the amendment of September 26, 1888, struck out that limitation and inserted the specific word "letter" among the excluded things, without regard to what should be upon the envelope. It is difficult to see how the intent of Congress to ex-
54 clude all letters of the character denounced could have been made plainer.

By a proviso to the act of September 26, 1888, it was declared that nothing in the act shall authorize any person to open any letter or sealed matter of the first class not addressed to himself. This provision of the statute securing the sanctity of private correspondence is in line with what was held by the Supreme Court in *Ex parte* Jackson, 96 U. S., 735, where it was said that whilst the law excluding from the mails obscene, lewd, or lascivious letters cannot "be enforced in a way which would require or permit an examination into letters or sealed packages subject to letter postage without warrant, issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation in other ways, as from the parties receiving the letters or packages or from agents depositing them in the post-office or others cognizant of the facts."

Demurrer overruled.

ROSS,
District Judge.

(Endorsed:) No. 582. U. S. district court, so. district of Calif. United States of America *vs.* A. D. Andrews. Opinion. Filed Dec. 6th, 1893. E. H. Owen, clerk.

55 In the District Court of the United State of America in and for the Southern District of California.

UNITED STATES OF AMERICA, Plaintiff,
vs.
ARTHUR D. ANDREWS, Defendant. } No. 582.

I, E. H. Owen, clerk of the district court of the United States of America in and for the southern district of California, do hereby certify the foregoing pages, numbered from 1 to 62, inclusive, to be a full, true, and correct transcript of the record of the district court in the above-entitled cause.

Seal of the U. S. District Court, Southern Dist. of California.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 5th day of January, A. D. 1895.

E. H. OWEN,
Clerk of the U. S. District Court in and for the Southern District of California.

Endorsed on cover: Case No. 15,800. S. California D. C. U. S. Term No., 532. Arthur D. Andrews, plaintiff in error, *vs.* The United States. Filed February 20, 1895.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

ARTHUR D. ANDREWS, *Plaintiff in Error*,
v.
UNITED STATES, *Defendant.*
} No. 916.

MOTION TO ADVANCE.

The plaintiff in error was convicted in the district court of the United States, for the southern district of California, upon an indictment, charging him with mailing and sending through the mails of the United States an obscene letter, in violation of section 3893 of the Revised Statutes of the United States as amended by section 2 of the act of September 26th, 1888, (25 Stats. 496), and on the 6th day of March, defendant was sentenced to three years in the penitentiary of California, at San Quentin, and fined $1000.00, in addition thereto.

Defendant has not been released on bail pending the decision of this court, but is now confined in the county jail of the county of Los Angeles, California.

The principal question involved is whether a conviction can be had for sending a private letter through the mail of the United States in an envelope on which there is nothing but the

name and address of the person to which it is sent, and further whether conviction can be had where the correspondence was solicited by a post-office inspector under an assumed name inviting such correspondence.

In view of the fact that the defendant is now in jail and is unable to give bail and the further facts that the judges of the lower courts have taken opposite views upon the question herein raised. [See U. S. vs. Andrews, 58 Fed. Rep. 861., U. S. vs. Wilson, Id. 798., U. S. vs. Naton, 61 Fed. Rep. 936., U. S. vs. Ling, Id. 1001.]

Plaintiff in error would further represent to this court, and attach hereto a copy of the affidavit now on file in this court, showing that the defendant is unable to prosecute this appeal by reason of his being totally without funds or means to pay the costs of the presentation of said appeal, and would pray this court that an order be made that the plaintiff in error be permitted to proceed *In Forma Pauperis*, and that said record be printed, and the case be advanced on the docket and the same set down for hearing at an early day.

Notice of this motion has been served upon the Solicitor-General. Proof hereof being filed with the clerk of this court.

J. MARION BROOKS,
Solicitor for Plaintiff in Error.

[TITLE OF COURT AND CAUSE.]

Affidavit.

Arthur D. Andrews, being first duly sworn, says: That he is the defendant and appellant in the above entitled cause; that he has not any property, real or personal; that he has no property in any way conveyed or concealed or in any way disposed of, for his future use or benefit; and that he is wholly unable to furnish means to have the record prepared for the appeal in said cause printed, as required by law.

ARTHUR D. ANDREWS.

Subscribed and sworn to before me this 18 day of Jan., 1895.

[NOTARY SEAL] J. MARION BROOKS,

Notary Public in and for the state of California, county of Los Angeles.

I am informed and have reason to believe the above statement to be true.

GEORGE J. DENIS,

United States Attorney Southern District of California.

SUPREME COURT

OF THE UNITED STATES.

October Term, 1895.

No. 532.

Arthur D. Andrews, Plaintiff in Error

vs.

The United States.

In Error to the District Court of the United States for the Southern District of California.

MOTION TO ADVANCE.

J. Marion Bicknell,
M. D. Stapleton,
Attorneys for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

October Term, 1895.

No. 532.

Arthur D. Andrews, Plaintiff in Error,

vs.

The United States.

In Error to the District Court of the United States for the Southern District of California.

MOTION TO ADVANCE.

Now comes the plaintiff in error in the above-entitled cause and moves the Court to advance said case on the docket, and to set the same down for argument on some future date to be fixed by the Court, and he assigns the following as grounds for said motion:

1. Because said plaintiff in error is now confined in the county jail at Los Angeles, California, and has been so confined since November 18, 1893, a period of over two years.

2. Because public policy demands that the conflicting views of the lower Court upon the precise questions of law on which the conviction was had in this case should be finally determined by this Court.

STATEMENT OF THE CASE.

The plaintiff in error was indicted on November 18, 1893, in the District Court of the United States for the Southern District of California, for mailing and sending through the mails of the

United States an obscene letter, in violation of Section 3893, Revised Statutes, as amended by Section 2 of the Act of September 26, 1888. (25 Statutes, 496.)

He was convicted on February 9, 1894, with a recommendation to the mercy of the Court on account of his youth, and was sentenced to three years in the California Penitentiary and fined $1,000 in addition thereto.

He is a poor and friendless youth, and has been confined in jail since the date of his indictment, and the record in this Court has been printed by contributions made by charitable people, whose sympathy has been aroused at his forlorn condition, and owing to the long time that he has been confined in jail it is submitted that justice will be promoted by an early decision of the case by this Honorable Court.

The main questions involved on the merits of this case are, whether a conviction can be had for sending a private letter through the mail in an envelope on which there is nothing but the name and address of the person to whom it is sent.

And whether a conviction can be had where the letter was solicited by a Post Office Inspector, under an assumed name, inviting the correspondence for which the plaintiff was indicted.

Upon these questions there has been, and still is, grave conflict of opinion in the lower Courts, which ought of right to be settled finally by the decision of this Honorable Court.

Vide. U S. *vs.* Andrews, 58, Fed. Rep., 861; U. S. *vs.* Wilson, *ibid.*, 798; U. S. *vs.* Naton, 61, Fed. Rep., 936; U. S. *vs.* Ling, *ibid.*, 1001.

Notice of this motion has been duly served upon the Solicitor-General, and proof thereof filed with the Clerk of this Court.

J. MARION BROOKS,
M. D. BRAINARD,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

ARTHUR D. ANDREWS, *Plaintiff in Error*,
v.
THE UNITED STATES,
} No. 532.

In Error to the District Court of the United States for the Southern District of California.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error was indicted on November 18, 1893, in the District Court of the United States for the Southern District of California, in an indictment containing two counts, for depositing and causing to be deposited in the postoffice at Los Angeles, two obscene letters, in violation of Section 3893, of the Revised Statutes, as amended by the Act of September 26, 1888. (25 Statutes at Large, 496, Record, p. 4.)

On November 27, 1893, the defendant demurred to the indictment on the ground "that the facts stated in the indictment do not constitute an offense against the laws of the United States.

"Wherefore, for the want of a sufficient indictment in this behalf, the said defendant prays judgment that by an order of this Court he may be dismissed and discharged from the said charge in said indictment specified." (Record, p. 5.)

The Court overruled the demurrer on December 6, 1893, and the defendant excepted, and assigns said ruling as error. (Vide assignment of errors. Record, pp. 5, 25.)

The defendant was tried and convicted of February 9, 1894, and recommended to the mercy of the Court by the jury on account of his youth. (Record, p. 8.)

Motions in arrest of judgment, and for a new trial were then filed and overruled, and the defendant was then sentenced to imprisonment at hard labor in the State prison, at San Quentin, for the period of three years, and to pay a fine of ($1,000. (Record, pp. 12, 13.)

On the trial of the case it was proved on behalf of the United States, that a short time before the finding of the indictment, the following advertisement appeared in a newspaper published at Los Angeles, known as the *Los Angeles Herald*, to wit:

"Personal preventitives for married ladies of a financial standing. No fake but a reality. For curiosity's sake address Spero, box 60, this office." (Record, 14.)

It appears that this advertisement was seen by M. H. Flint, a postoffice inspector, who caused certain decoy letters to be written to "Spero," in the name of Susan H. Budlong, and the answers to those decoy letters are the obscene letters which the defendant was indicted and convicted for depositing in the postoffice.

The said M. H. Flint, being called as a witness on the part of the Government, testified as follows: "I am a Postoffice Inspector. Upon reading the advertisement in the paper I answered it by letter. I did not write the letter, but I sent and mailed it. M. H. Flint is Susan H. Budlong. This (referring to a letter shown witness) is a copy made by myself. The person who wrote it, the postmaster of this city, and I saw this letter. Susan Budlong is a fictitious name assumed by me." (Record, p. 20.)

On cross-examination this witness further testified: "I commenced the correspondence with Spero in response to the advertisement. My object was to find out whether he had a

preparation for me in the abortion business. I was acting under certain instructions. I opened the letters in the presence of the postmaster always. The publication given to these letters was given by me." (Record, p. 23.)

The defendant objected to the admission in evidence of copies of the decoy letters, as well as to the alleged obscene letters described in the indictment. (Record, pp. 20, 21, 22, 23.)

At the conclusion of the evidence for the Government, the defendant moved the Court to instruct the jury to acquit the defendant on the ground that if any offence had been committed, it had been at the request of Mr. Flint, a Government officer, and on the further ground that the evidence is insufficient to connect the defendant with the alleged offence, which motion was denied and the defendant excepted. (Record, p. 24.)

The defendant then requested the Court to give certain written instructions to the jury; which request was refused and the defendant excepted. These charges are printed at length on pages 9, 10, and 11 of the Record, and the action of the Court in rejecting them is assigned as error here, and particularly as to the following, to wit:

"The jury are instructed that the good character of the defendant is a fact in the case tending to establish his innocence; therefore, in the present case the good character of the defendant, if proven to your satisfaction, is to be considered by you in connection with the other facts and circumstances in this case, and as to whether a person who had prior to the alleged crime sustained a good character, would have committed such a crime." (Record, p. 10.)

"The jury are further instructed that the testimony of one Flint, who has testified in this case, should not be considered by you, and that such testimony is not permitted to be received by the jury, it appearing from the evidence that the said Flint did instigate and encourage the defendant to commit the crime at bar, if committed at all, before the defendant had formed any intent to commit such crime, and the said Flint, being an officer of the United States, cannot thus instigate the commission of a crime, and the Government take advantage of his unlawful act." (Record, p. 11.)

Inasmuch as the original Section 3893, Revised Statutes, was the subject of judicial consideration by this Court in the case of United States *v.* Chase, (135 U. S., 255,) said original section, and the substitute therefor, enacted by the Act of Congress approved September 26, 1888, are here quoted in full for convenience of comparison in the argument and consideration of the case, to wit:

"Section 3893. Every obscene, lewd or lascivious book, picture, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice, nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of the same, shall be deemed guilty of a misdemeanor, and shall for each and every offence be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the Court."

The Act of September 26, 1888, is as follows:

"That the last clause of the second section of 'An Act relating to Postal Crimes, and Amendatory of the Statutes therein mentioned', approved June 18, 1888, be, and the same is hereby, so amended as to read as follows, and constitute the third section of said act:

"Section 3. That all matter otherwise mailable by law, upon

the envelope or outside cover or wrapper of which, or any postal card upon which any delineations, epethets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrelous, defamatory or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injudiciously upon the character or conduct of another may be written or printed, or otherwise impressed or apparent, are hereby declared non-mailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice, nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe; and any person who shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same shall for each and every offence, upon conviction thereof, be fined not more than five thousand dollars or imprisoned at hard labor not more than five years, or both, at the discretion of the Court.

"Section 2. That Section 3893 of the Revised Statutes as amended by Act of July 12, 1876, is hereby so amended as to read as follows:

"Section 3893. Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, pamphlet, book, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or of by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails from any postoffice, nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken from the mails for the purpose of circulating or disposing of, aiding in the circulation or disposition of the same, shall, for each and every offence be

fined upon conviction thereof not more than five thousand dollars, or imprisonment at hard labor not more than five years, or both, at the discretion of the Court; and all offences committed under the section of which this is amendatory, prior to the approval of this act, may be prosecuted and punished under the same in the same manner and the same effect as if this act had not been passed. *Provided:* That nothing in this act shall authorize any person to open any letter or sealed matter of the first-class not addressed to himself."

25 Stat., 496.

Assignment of Errors.

1. The Court erred in permitting the witness Flint to testify in said case for the reason that said witness was an officer of the Government of the United States, and that the correspondence carried on was sealed, and carried on for the sole purpose of obtaining evidence from the defendant upon which to base this prosecution.

2. The Court erred in admitting the letters in evidence for the reason that there is no evidence connecting the defendant with the writing or mailing of the same.

3. That said letters were not such letters as are prohibited from being transmitted, as provided, through the mails of the United States.

4. The Court erred in admitting said letters in evidence for the reason that they were sealed, and addressed to Susan Budlong, there being no such person as Susan Budlong in existence.

5. The Court erred in its refusal to give the instructions asked for by the defendant.

6. The Court erred in giving the instructions to the jury.

7. The Court erred in its refusal to instruct the jury to acquit the defendant, for the reason that the evidence is insufficient to prove each and every essential element of the alleged offence.

8. The Court erred in overruling the demurrer to the indictment. (Record, pp. 24, 25.)

For convenience of argument the 1, 2, 3, and 4 assignments of error will be considered together.

The testimony of the Postoffice Inspector, Flint, should have been ruled out by the Court in accordance with the request of the defendant, for the reason that said Flint instigated and encouraged the defendant to commit the offence charged in the indictment, and the United States cannot, through its officers, instigate the commission of crime, and then take advantage of such unlawful act.

At the time Flint sent the decoy letters the defendant had formed no intention of sending any letters through the mail, and if such an intention was afterwards formed, it was instigated by Flint. The publication in the newspaper, while open to condemnation from a moral point of view, was not an offence against the postal laws of the United States, and that at most, was the extent of the defendants' offending, until instigated to a violation of the postal laws by a Government officer.

People *v.* Collins, 53 Cal., 185.
Thompson *v.* State, 81 American Decisions, 364.
38 American Rep., 129.

The evidence shows conclusively that the letters in question were private sealed letters enclosed in envelopes, upon which there was nothing but the name and address of the person to whom they were sent, and the depositing of such letters in the mail is not an offence within the meaning of Section 3893, of the Revised Statutes.

United States *v.* Chase, 135 U. S., 255.

In the above-mentioned case this Court, in construing the original Section 3893, (Act of July 12, 1876, 19 Stat. 90,) said:

"In the statute under consideration, the word 'writing' is used as one of a group or class of words—book, pamphlet, picture, paper, writing, print—each of which is ordinarily and *prima facie* understood to be a publication; and the enumera-

tion concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated. It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written. * * * The decisions of the circuit courts upon the question presented to us by this certificate have been conflicting. Those sustaining indictments in cases similar to this, hold that the term 'writing' comprehends 'letters,' and insist that even if the general phrase 'other publication' is allowed to apply to the word, the sending or mailing a letter by one person to another is a sufficient publication to bring a letter within the statute, as is held to be the case in an action of slander and libel.

"The reply to this is, that the statute prohibits the conveyance by mail of matter which is a publication before it is mailed, and not such as becomes a publication by reason of its being mailed." (135 U. S., *Supra.*)

The reasoning of the Court in the above case applies with full force to the amended Section 3893, which provides that every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print *or other publication* of an indecent character, etc., shall not be conveyed in the mails. If the decision of the Court above-cited does not control the construction of the amended statute wherein the word "letter" is included as one of the group or class of words, *then the statute as amended is clearly unconstitutional and void.*

The decision under consideration declares clearly and distinctly two rules of construction for this statute:

First. The phrase or "other publication" applies to and qualifies all the preceding enumerated articles.

Second. The statute prohibits the conveyance of mail matter of an obscene character, which is a publication *before it is mailed* and not such as becomes a publication by reason of its being mailed.

The private sealed letters addressed to Susan Budlong and contained in envelopes upon which there was nothing but the

address of the party to whom the letters were sent, certainly did not, in fact and law, constitute a publication of the contents of said letters.

The Government Officer, Flint, admits that he opened the letters, and that the publication of them was made by him. (Record, p. 23.)

This act was a criminal offence, and a violation of the provisions of Sections 3891 and 3892 of the Revised Statutes, and it was also an unlawful seizure of said letters without oath or warrant, in plain violation of Article 4 of the Constitution of the United States.

This question was settled in the case of Ex Parte Jackson, in which this Court said:

"The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement, a distinction is to be made between different kinds of mail matter—between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to in-

vade the secrecy of letters, and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." (96 U. S., 732.)

Obscene matter contained in a sealed letter, enclosed in an envelope, on which there is nothing but the name and address of the person to whom it is sent, is not "published" and its contents made known to third parties, merely by being deposited in the mails, and the evil which the statute prohibits, can only arise when such letter is opened and read by the person to whom it is mailed. When it is so received and opened it is "published" and the person receiving it is a competent witness to complain and prove a violation of the law; but no ministerial officer of the government can, on his own motion, and without a warrant duly sworn out for that purpose, be permitted to seize and open a sealed letter in transit through the mails which is not addressed to him, in order to obtain evidence of violations of law; for such an act would destroy public confidence in the inviolability of correspondence passing through the mails, and would be a clear violation of the fourth amendment to the Constitution. The amended Section 3893, can only apply to unsealed circular letters and retain any constitutional validity. (Ex Parte Jackson, 96 U. S., *Supra*; Uuited States *v.* Chase, 135 U. S., *Supra*; United States *v.* Warner, 59 Fed. Rep., 355; U. S. *v.* Jarvis, *ibid.*, 357; United States *v.* Clark, 43, *ibid.*, 574; United States *v.* Wilson, 58, *ibid.*, 769.)

The opening of sealed letters by Government officials without authority of warrants issued pursuant to law, in order to procure evidence of criminal acts, was clearly prohibited prior to the passage of the amended Section 3893 in 1888, and that Section as amended expressly provided: "*that nothing in this act shall authorize any person to open any letter or sealed matter of the first-class not addressed to himself,*" (25 Stat., 496,) thus leaving the state of the law precisely as it stood before the amendment was adopted.

Further argument to show that evidence obtained in viola-

tion of the penal laws of the United States, and in violation of the constitutional rights guaranteed to the citizens of this country by the fundamental laws of the land; by the seizure and opening of private letters by Government officials, without oath or warrant, cannot be used as evidence against a citizen is deemed unnecessary.

Such action on the part of ministerial officers in seeking to detect and punish alleged offenders is even more criminal than the offences which they seek to punish, and the courts have never hesitated to condemn the employment of spies and decoys to lead men on to the commission of crime on the pretense of bringing criminals to justice.

The Court below clearly erred in refusing to instruct the jury that the good character of the defendant was a fact in the case to be considered by them in connection with the other facts, as tending to establish his innocence. This error is so manifest that a citation of authorities in support of the proposition before this tribunal is deemed unnecessary.

There is no proof whatever to show that the defendant deposited the letters complained of in the mail, or that he caused them to be deposited by another; and the want of proof upon this point seems to have been supplied by inference and mere suspicion. The witness Liddell, who arrested him, testified that he found two letters on his person, but he did not state that those letters had any relation to this case.

Said witness also testified that he found copies of the exhibits 15, 16 and 17 in a shoe-box in the defendant's room, but it is not shown that those copies, or in fact any of the letters introduced in evidence, are in the handwriting of the defendant. This witness also testified that there were other persons occupying the same room with the defendant. (Record, p. 24.)

The indictment in this case was clearly defective because it was not framed in substantial conformity with Section 3893 of the Revised Statutes as amended, and did not charge the defendant with the particular offence which that statute prohibits.

It is charged that the defendant "did knowingly, willfully and unlawfully deposit and cause to be deposited *in the United States Postoffice* at the city of Los Angeles, and district afore-

said, *for delivery*, a certain obscene, lewd, and lascivious letter addressed to Susan Budlong." Examination of Section 3893, Revised Statutes, will show that its purpose was to exclude obscene letters, etc., *from the United States mails.*

This statute was designed and intended to exclude any and all of the articles and things named therein *from being carried in the mails*, and it imposes a penalty upon any person "who shall knowingly deposit or cause to be deposited, *for mailing* or delivery" any of the prohibited articles or things.

This indictment fails to charge that the letters complained of were ever deposited *for mailing, or that they were ever in the mails.* It merely charges *that they were deposited in the post-office for delivery*, and it does not aver that they were to be carried, transported, or delivered *by mail*, but leaves that material fact to be inferred and implied. It simply charges that the letters were deposited *in the postoffice*, and that may be true and still not constitute an offence unless it is averred that they were deposited *for mailing, or delivery by mail*, and in a place in the postoffice provided for mailing letters by the public.

The allegation that the letters were deposited *in the post-office for delivery* is not the equivalent of an averment that they were deposited *in the mail for mailing or deliver by mail.*

Under this indictment the inference must be drawn that the pleader meant *United States mail*, when he used the word *post-office;* and we must also infer that the letters were intended to be delivered *by mail*, although that material fact is not alleged in the indictment.

The offence charged is purely statutory, and is not charged in language sufficient to bring it within the statutory description of the offence, or in the substantial words of the statute, and these defects in the indictment cannot be supplied by implication or intendment.

First, Bishop Crim. Prac., Sec. 611.
Wharton's American Criminal Law, Sec. 364.
United States *v.* Simmons, 96 U. S., 392.

Respectfully submitted,

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THE LAW ASSOCIATION
OF

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ARTHUR D. ANDREWS, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 532.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR DEFENDANT IN ERROR.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR DEFENDANT IN ERROR.

Arthur D. Andrews, plaintiff in error, was indicted for mailing indecent letters on November 2 and 3, 1893. He was tried before Judge Ross and a jury, and convicted February 9, 1894.

The indictment is in two counts. Each alleges that on the date mentioned the defendant—

> Did knowingly, willfully, and unlawfully deposit and cause to be deposited in the United States post-office at the said city of Los Angeles, county and district aforesaid, for delivery, a certain obscene, lewd, and lascivious letter addressed to "Mrs. Susan Budlong, box 661, Los Angeles, Cal."

The indictment further alleges that the letters are too obscene to be set forth in full in the indictment, but describes them by date and by some extracts (p. 4).

The indictment was found and the prisoner convicted under § 3893 of the Revised Statutes as amended by the act of September 26, 1888, ch. 1093, § 2.

This act, before 1888, made the following matter unmailable:

> Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character. * * *

It also made criminal—

> Any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter.

The act of 1888 amended this by inserting the word "letter" between the words "paper" and "writing." It also adds the following proviso:

> *Provided*, That nothing in this act shall authorize any person to open any letter or sealed matter of the first class not addressed to himself.

It will be noticed that § 3893 as printed at page 4 of the brief filed on behalf of the plaintiff in error is defective, omitting the words "pamphlet" and "paper." These defects, however, are immaterial.

ARGUMENT.

We take up the assignments of error *seriatim*.

I. Objection is made because the letters set forth in the indictment were obtained by a Government officer

through a decoy. This assignment of error is disposed of by *Grimm* v. *United States*, 156 U. S., 604. In that case counsel insisted that:

> The Government will not be permitted, through its officers, to *induce* a crime to be committed and then be heard to complain.

The point was fully discussed in the opinion of this court and held untenable. To the same effect is *Goode* v. *United States*, 159 U. S., ——. This case also holds that a letter is a letter, though addressed to a fictitious person at a fictitious residence.

The circumstances in the Grimm case are very similar to those in the case at bar. It is suggested here that the act of the officer who opened the letter is in violation of the Fourth Amendment to the Constitution, and also a violation of the proviso to § 3893 as amended in 1888. Argument seems hardly necessary on the former point, nor can the proviso be reasonably construed as intended to prevent persons from corresponding under assumed names.

II. This assignment is not based upon any exception.

III, IV. These assignments of error are intended to raise the point that a sealed letter is not within the meaning of § 3893, even as amended by the act of 1888. The question was left open by *United States* v. *Chase*, 135 U. S., 255, 262. That case arose prior to 1888, and Mr. Justice Lamar said:

> If letters were embraced in the statute on which this indictment was founded, why did Congress con-

> sider it necessary to insert the specific word to designate them in 1888? It must be that that body did not put the construction on the prior statute claimed in behalf of the United States, else we have it doing a useless and vain act. But as the amendment of 1888 is not involved in this case, no opinion is expressed as to whether the term "letter" as used therein can, under a proper construction of that statute, be held to include a strictly private sealed letter.

A strictly private sealed letter is a letter, as is recognized by the Grimm and Goode cases, *supra*. The attention of Congress was evidently called to the distinction between sealed and unsealed letters, because it expressly provided that the amendment should not "authorize any person to open any letter or sealed matter of the first class not addressed to himself." It is submitted that the intent to bring sealed letters within the prohibition of the statute (while not allowing letters to be broken open by post-office officials without authority for the purpose of detecting a crime) is entirely clear. A safe rule, as pointed out in an opinion quoted in the Chase case, *supra*, is "to adopt what the Legislature have actually said."

Some of the courts in dealing with this amendment of 1888 have destroyed the effect of the word "letter" by arguments drawn from the use of the words "or other publication." The latter words are an inheritance from the unamended statute. The amendment of 1888 certainly introduces some inconsistency. It would have been better to have stricken out the word "other." Still, the

more important thing to look at is the word inserted by the amendment, just as, in construing an instrument drawn on a printed form, the words written in by the parties are given the greater weight in case of conflict. (2 Wharton on Contracts, § 652.) Presumptively a change in meaning was intended (*Rich* v. *Keyser*, 54 Pa. St., 86, 89; *Rutland* v. *Mendon*, 1 Pick., 154, 156; *The Queen* v. *Price*, L. R. 6 Q. B., 411, 416); and the new word "must receive its natural and ordinary signification." (*James* v. *Patten*, 6 N. Y., 9, 14.)

The decisions of the lower courts have been in conflict. The opinion of Judge Ross in the case at bar is contained in the record, and also reported at 58 Fed. Rep., 861. To the same effect are *In re Wahll*, 42 Fed. Rep., 822, R. R. Nelson, J.; *United States* v. *Gaylord*, 50 Fed. Rep., 410, Treat, J.; *United States* v. *Martin*, 50 Fed. Rep., 918, Paul, J.; *United States* v. *Nathan*, 61 Fed. Rep., 936, O. P. Shiras, J.; *United States* v. *Ling*, 61 Fed. Rep., 1001, Townsend, J. Opposed are *United States* v. *Wilson*, 58 Fed. Rep., 768, Morrow, J.; *United States* v. *Warner*, 59 Fed. Rep., 355, and *United States* v. *Jarvis*, id., 357, Hanford, J. Some remarks to the same effect by Judge O. P. Shiras in *United States* v. *Clark*, 43 Fed. Rep., 574, are opposed to his own subsequent ruling in the Nathan case, *supra*.

V. This is a single exception to the denial of a single request to charge containing a long series of different propositions. These propositions are set forth at pages 9–11. They come within the rule of *Beaver* v. *Taylor*,

93 U. S., 46, 54, recently reiterated in *Thiede* v. *Utah*, 159 U. S., 510, 520:

> The entire series of propositions was presented as one request, and if any one proposition was unsound an exception to a refusal to charge the series can not be maintained.

A number of other cases to the same effect are cited in the Thiede case.

The instructions actually given by the court do not appear in the record. It is presumable that defendant's requests, so far as they stated the law correctly, were refused because they were regarded as unnecessary. (See *Anthony* v. *Louisville Railroad Co.*, 132 U. S., 172; *Tucker* v. *United States*, 151 U. S., 164, 170.) "That the law was fully given by the court to the jury we are bound to presume in the absence from the record of the entire charge, and that it was correctly stated, from the fact that plaintiffs in error took no exceptions to it;" so that the instructions "may have been refused because already fully given in the general charge." (*Reagan* v. *Aiken*, 138 U. S., 109, 113, 114.)

VI. It appears in the record that defendant "objected to all instructions given by the court," but it does not appear how he objected nor what he objected to.

VII. There was no motion to acquit at the end of the case. The motion made at the close of the prosecution's testimony was waived by subsequently putting in evidence. (*Union Pacific R. R. Co.* v. *Daniels*, 152 U. S., 684; *Wilson* v. *Haley Live Stock Co.*, 153 U. S., 39; *Runkle* v. *Burnham*, 153 U. S., 216.)

VIII. The court overruled a demurrer to the indictment. The omission to set out the letters in full is sustained by the Grimm case, *supra*. The indictment states that defendant did knowingly deposit the letter in a described post-office for delivery. This is precisely in accord with the statute, and also fully describes the act, so that defendant knows what he is charged with.

It is respectfully submitted that the judgment should be affirmed.

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